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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 393

CHRISTINE COLLINS, A. J. CUMMINS, YANCEY LEE CUMMINS AND EDWARD J. MILLER, PETITIONERS,

vs.

CHESTER BOWLES, PRICE ADMINISTRATOR

ON WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

PETITION FOR CERTIORARI FILED AUGUST 31, 1945.

CERTIORARI GRANTED NOVEMBER 5, 1945.

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 20, 1945.

IN UNITED STATES EMERGENCY COURT OF APPEALS

GEORGE C. COLLINS, JR., CHRISTINE COLLINS, A. J. CUMMINS, Yancy Lee Cummins and Edward J. Miller, Complainants,

vs.

CHESTER BOWLES, Price Administrator, Respondent

COMPLAINT—Filed June 22, 1945

The complaint of George C. Collins, Jr., Christine Collins, A. J. Cummins, Yancey Lee Cummins and Edward J. Miller, respectfully shows that:

I. The names and postoffice addresses of the complainants are:

George C. Collins, Jr., Glenview, Ky.
Christine Collins, Glenview, Ky.
A. J. Cummins, 3020 Poppy Way, Louisville, Ky.
Yancey Lee Cummins, 3020 Poppy Way, Louisville, Ky.
Edward J. Miller, 2059 Eastern Parkway, Louisville, Ky.

II. The regulations, orders or price schedules protested and the effective dates thereof are:

(a) The General Maximum Price Regulation issued by the Price Administrator on the 28th day of April, 1942, pursuant to the Emergency Price Control Act, effective May 11, 1942.

(b) M. P. R. 193 issued August 2, 1942, effective August 5, 1942.

(c) Any amendments thereto sought to be injected into this proceeding as being applicable to the transactions hereinafter mentioned, including the price schedules promulgated under the authority of either General Maximum Price Regulation or M. P. R. 193.

III. Complainants filed their protest herein before the Price Administrator on May 4, 1945. On the 2nd day of June, 1945, the Price Administrator entered an order dismissing said protest on procedural grounds and without referring the protest to a Board of Review for decision on the merits.

IV. The manner in which the complainants have been aggrieved by the dismissal of their protest is as follows:

(1) The Price Administrator erroneously declined to consider the objections interposed in the protest to the regulations aforesaid that were protested.

(2) The Price Administrator erroneously concluded that it was a necessary requisite for his consideration of the objections to the regulations that complainants likewise protest Regulation 445 that was issued August 14, 1943, long after the transactions hereinafter set forth occurred.

(3) The Price Administrator erroneously concluded that because General Maximum Price Regulation aforesaid and M. P. R. 193 aforesaid had, subsequent to the transactions mentioned in the protest, been rescinded and superseded by M. P. R. 445 as to distilled spirits, he could no longer consider the objections to General Maximum Price Regulation aforesaid or M. P. R. 193, despite the fact that the Price Administrator relies upon the latter regulations to

collect treble damages in a case pending against Complainants in Kentucky.

(4) The Price Administrator erroneously concluded that the protest failed to comply with Section 203(a) of the Emergency Price Control Act, as amended.

(5) The Price Administrator erroneously concluded that the complainants had no right to file the protest.

(6) The Price Administrator erroneously concluded that the protest of the complainants was not in compliance with the provisions of the Emergency Price Control Act, as amended, and more particularly section 204 (e) thereof, and erroneously concluded that to consider the merits of this protest would circumvent the Act.

(7) The Price Administrator, in effect, erroneously concluded that the only recourse of complainants was to file a petition in the Federal District Court and get leave to file a complaint direct to this Court, which assumption is contrary to the express provision of section 203(a) of the Emergency Price Control Act, as amended.

(8) The Price Administrator erroneously concluded that because the complainants owned no warehouse receipts after January 9, 1943, they were without right to file the protest because that date was before the effective date of Maximum Price Regulation 445.

(9) Because the Price Administrator failed to sustain the protest.

(10) Because the Price Administrator failed to have their protest considered by a Board of Review, as requested in their protest despite the fact that Section 203(c) of the Emergency Price Control Act, as amended, makes such consideration *mandatory* upon request of a protestant.

(11) The dismissal by the Price Administrator of the protest was such a denial of a reasonable opportunity to be heard as constituted an offense against the due process clause of the Fifth Amendment of the Federal Constitution.

V. The complainants were without right to protest a regulation not in existence at the time of their alleged sale of warehouse receipts for whiskey in January, 1943, and the Price Administrator had, on May 7, 1943, filed his petition against them by reason of such sale seeking triple damages. General Maximum Price Regulation aforesaid, and M. P. R. 193 are the regulations with which the complainants are charged as having violated in the aforesaid suits, and the only regulations involved therein.

VI. The objections asserted in the protest against the regulations, orders and price schedules protested, which are intended to be relied upon in support of the complaint, are as follows:

(a) The General Maximum Price Regulation issued April 28, 1942, does not apply to warehouse receipts issued against whiskey stored in warehouses generally.

(b) Warehouse receipts for whiskey are not commodities but are mere evidences of ownership of an interest in the commodities, without right of either of these protestants at any time to possess, sell or otherwise dispose of the whiskey covered thereby.

(c) Warehouse receipts in the hands of these protestants as owners were and are negotiable securities and made so by the laws of the Commonwealth of Kentucky where they were issued and where they were owned by these protestants and where they were sold as hereinafter set forth.

(d) The Commonwealth of Kentucky, following the adoption of the Twenty-first Amendment, adopted a com-

prehensive control and price-fixing statute long prior to the enactment of the Emergency Price Control Act, and was actively, and has been actively, enforcing that Act, the terms and provisions of which are contrary to the terms and provisions of General Maximum Price Regulation aforesaid and M. P. R. 193 aforesaid, if those regulations are construed to be in conflict therewith, and these protestants assert that they are in conflict therewith.

(e) That both the General Maximum Price Regulation aforesaid and M. P. R. 193 aforesaid, if held to be applicable to warehouse receipts for whiskey handled or sold within the Commonwealth of Kentucky, are unconstitutional and void because Kentucky has appropriated unto itself regulations, including price-fixing, which are contrary thereto.

(f) Both the General Maximum Price Regulation and M. P. R. 193 are so vague and indefinite in their terms and so impossible of interpretation that even the Office of Price Administration was unable to conclude that they, or either of them, covered warehouse receipts for whiskey, and as a result of the confusion created, the Office of Price Administration, to clarify the confusion thus created by attempting to apply those regulations to warehouse receipts, adopted for the first time a ceiling on warehouse receipts as of February 3, 1943, long after the sale of the warehouse receipts here involved. Those regulations were so confusing that the whiskey trade generally, after consulting with various enforcing officers, came to the conclusion, without objection from the Price Administrator's Office, that warehouse receipts were not covered, and accordingly the trade generally bought and sold warehouse receipts until February 1943, without any thought that they could possibly be violating either one of the foregoing regulations.

VII. The facts upon which these complainants relied to support their protest are as follows:

(a) At all the times mentioned herein, the protestants were, and are now, citizens of, and resided in, the Commonwealth of Kentucky where all of the transactions hereinafter referred to occurred.

(b) Prior to December 1, 1942, protestants, and each of them, were owners and holders of common capital stock of the Cummins Distilleries Corporation, a Delaware corporation, with its principal office at Louisville in the Commonwealth of Kentucky, and which corporation conducted all of its business, at all the times hereinafter mentioned, in Kentucky where it owned and was operating a distillery, including certain bonded warehouses in which it had stored approximately 51,000 barrels of bourbon whiskey. The protestants owned, at the aforesaid time, in their own right common capital stock of said corporation as follows:

George C. Collins, Jr.	10,523 shares
Christine Collins	10,524 shares
A. J. Cummins	16,890 shares
Yancey Lee Cummins	1,238 shares
Edward J. Miller	175 shares
making a total of	39,350 shares

Each of these shares had a par value of $1.00 and a fair market value as of December 1, 1942, of approximately $13.00 per share, or a total market value of all shares owned by them of $511,550.00.

(c) On November 30, 1942, the Board of Directors of the aforesaid corporation adopted a resolution calling a meeting of the stockholders to be held on December 24, 1942, for the purpose of voting on the question of liquidation of

the corporation under the laws of Delaware. Pursuant to that resolution, notice was given to each of the holders of outstanding stock of said corporation, and a meeting of the stockholders of the corporation was duly held on December 24, 1942, with the owners of 185,656 shares of the common capital stock present in person or by proxy out of a total common capital stock of 219,207 shares. At this meeting more than two-thirds of the outstanding stock was present and voted in favor of the liquidation of said corporation, and minutes of all of the foregoing steps were carefully kept and recorded in the minute books of said corporation. After the foregoing meeting of the stockholders of the Cummins Distilleries Corporation was held as aforesaid, and on December 24, 1942, the Board of Directors of said corporation, in obedience to the laws of the State of Delaware, and pursuant to the resolutions aforesaid took active steps to wind up the corporation and surrender its charter to the State of Delaware.

(d) On December 24, 1942, and following the meeting of the stockholders aforesaid, the Board of Directors of said corporation approved a plan of complete liquidation of said corporation, in accordance with the resolutions adopted by the stockholders, and after making provision for the payment of all of its debts and other liabilities, made a distribution in kind of the warehouse receipts issued by it against the whiskey it owned and had stored in its warehouses aforesaid, ratably and proportionately to each and all of its stockholders, including these protestants. Thereafter, and on December 29, 1942, the aforesaid warehouse receipts were delivered to the stockholders of the corporation in accordance with the resolutions adopted on December 24, 1942. From December 29, 1942, the Cummins Distilleries Corporation never owned or had any interest in either one of the warehouse receipts so distributed to its stockholders aforesaid. From December 24, 1942, the Cummins Dis-

tilleries Corporation never did any new business, but confined itself exclusively to the winding up of its affairs by its Board of Directors in accordance with the laws of Delaware, which laws gave it a limited time within which to wind up its affairs and close its business.

(e) On December 31, 1942, the proper officials of the State of Delaware recognized the validity of the dissolution of the Cummins Distilleries Corporation, and under and pursuant to the laws of that State caused to be issued and delivered to the Cummins Distilleries Corporation its certificate of dissolution. The foregoing steps of the directors were recorded properly in the minutes of the corporation, and the original certificate of dissolution was delivered to the directors of said corporation, photostatic copies of all of which documents are filed herewith as a part hereof and numbered as hereinafter set forth.

(f) Beginning January 4, 1943, and within Kentucky, the stockholders of the Cummins Distilleries Corporation aforesaid sold and delivered their warehouse receipts to purchasers willing to pay therefor, the last sale being on or about January 9, 1943, which was in strict accord with Kentucky law.

(g) Prior to all of the times hereinabove mentioned, and prior to the existence of the Price Control Act adopted by the Congress of the United States, and following the adoption of the Twenty-first Amendment to the Constitution of the United States, the Commonwealth of Kentucky, by and through its legislative department, adopted what is known as its Alcoholic Beverage Control Act, being Chapter 241 of Kentucky Revised Statutes for 1942 and Sections 241.010 to and including 242.090. By that Act the Commonwealth of Kentucky appropriated to itself sole and exclusive control over the manufacture, distribution, transportation, possession and sale of alcoholic beverages within the

Commonwealth of Kentucky, and took active control over all alcoholic beverages within the Commonwealth of Kentucky, including every beverage of any kind that contained alcohol or malt beverage except the proprietary or patent medicines.

(h) As a companion Act the legislative department of the Commonwealth of Kentucky adopted what is known as its Alcoholic Beverage-License and Tax Act, being Chapter 243 of Kentucky Revised Statutes aforesaid, Sections 243.020 to and including 245.990. By the terms of said statute the Commonwealth of Kentucky acquired sole and exclusive control over the traffic in alcoholic beverages as defined in said statute, over distilleries, wholesalers, retailers and every other form of traffic relating to the sale, transportation, possession or handling of alcoholic beverages, and authorized the levying and collection of taxes thereon for the protection of its revenue.

(i) In addition thereto, the Commonwealth of Kentucky adopted what is known as its Distilled Spirits and Wine Fair Trade Act, being Chapter 13 of the Acts of the General Assembly for 1940, under the terms of which it fixed the prices for the sale of alcoholic beverages defined in all of the foregoing Acts, who could sell, who could not sell, places where it could be sold, the containers in which it must be sold; and with suitable provision for taxation of the article and the protection of its revenue therein in the licensing and handling thereof;

(j) To enforce each and all of the aforesaid acts, and by the terms of the first above-mentioned Act, it created what is known as its Alcoholic Beverage Control Board, provided for appointments, vested in said Board the authority set forth in the statute, and authorized it to make regulations to carry into effect the terms and provisions of all of the aforesaid Acts. The Board thus provided

for was duly appointed, and after promulgating what it termed to be proper regulations, proceeded to function as such, and has at all times actively and aggressively functioned as such in the enforcement of said Acts within the Commonwealth.

(k) In adopting all of said Acts, it was the purpose of the Commonwealth of Kentucky thereby to take exclusive control of all alcoholic beverages where the sales were made either to purchasers within the Commonwealth of Kentucky and where transportation of the article was originated in Kentucky, or originated elsewhere and shipped into Kentucky, and likewise take exclusive control of the manufacture of such alcoholic beverages within the Commonwealth.

(l) After the adoption of all of the foregoing Acts, and in the case of *Reeves, Commissioner of Revenue* v. *Simons*, 289 Ky. 79, decided March 13, 1942, the Court of Appeals construed and held each of said Acts to be constitutional. In this case the constitutionality of the Fair Trade Act aforesaid was particularly attacked, and the Court of Appeals held it, as well as the whole legislative scheme in the control of alcoholic beverages within the Commonwealth, to be constitutional and the law of the Commonwealth with respect thereto. In stating the statutes before the court, it said:

> "This state rigidly controls the sale of liquor and wine from the distiller to the wholesaler, and from the wholesaler to the retailer.
>
> "Section 2554c-1 is to the effect that except as is otherwise provided, the Act shall be administered under the Alcoholic Beverage Control Law of 1938 (Chapter 2 of the Acts of that year, now Sections 2554b-97 to 2554b-222 of Kentucky Statutes, Baldwin's 1939 Supplement)."

The Act was challenged, as stated by the court, upon the following grounds:

> "Plaintiff's challenge of the constitutionality is under Sections 3, 19, 27, 28, 29, 51 and 109 of the Kentucky Constitution, and under the Due Process Clause of the Fifth and Fourteenth Amendments to the Federal Constitution."

(m) The Court of Appeals of Kentucky is the court of last resort of the Commonwealth of Kentucky, so by the authority of both the legislative and judicial departments of the Commonwealth of Kentucky, complete and absolute control of the manufacture and sale of alcoholic beverages within the terms of the statute, and which terms of the statute cover the product of the Cumming Distilleries Corporation made in accordance with the terms of that statute, has been taken by the Acts aforesaid, and the prices for the sales thereof fixed and administered by the proper officials of that Commonwealth.

(n) By the foregoing statutes and regulations made thereunder, the Commonwealth of Kentucky fixed the public policy of that State with respect to alcoholic beverages within the Commonwealth of Kentucky from and including the manufacturer to the consumer. As a part of that policy it was deemed necessary to fix the prices from distiller to consumer in order to prevent cut-throat prices, bootlegging and other methods of unfair competition that were about to demoralize and destroy the industry within the Commonwealth. It was likewise deemed to be desirable in order to protect citizens as well as the trade from the operation of dives and the sale of alcoholic beverages unfit for human consumption, and confine the trade into legal channels so as to afford a decent administration and control of the traffic within the boundaries of the Commonwealth, and prevent the shipment into Kentucky of beverages contrary

to its laws and the shipment out of Kentucky of such beverages into those communities that had prohibition.

(o) Each of the foregoing Acts provided heavy penalties for the violation thereof, including revocation and suspension of licenses.

(p) By the terms of the Acts aforesaid, all distilleries within the Commonwealth were required to procure licenses from the Commonwealth of Kentucky to manufacture distilled spirits. No liquors covered by the Act that were stored in warehouses could be withdrawn from the warehouses by the owners of warehouse receipts except and unless those owners were licensed to withdraw the same, and no liquor stored in warehouses thus licensed could be withdrawn from the warehouses by anyone, including a licensed operator, in barrels, and no such liquor could be delivered by a distillery to a licensee within the Commonwealth of Kentucky in containers containing in excess of one quart, and all of it had to be packaged in glass. There was no such thing under the laws of Kentucky as withdrawing from the warehouse thus maintained a barrel of whiskey called for by the receipts issued as hereinafter set forth, and no owner of a warehouse receipt could possess any part of the whiskey unless he was a licensee to do the particular thing with the liquor authorized to be done. A consumer or non-licensed person could not present a warehouse receipt, under the laws of Kentucky aforesaid, and obtain any liquor either in pints, half-pints or quarts, and no licensed bottler could receive distilled spirits and do other than package it in glass containers, and, after packaging, it had to be sold to wholesalers who in turn were compelled to distribute the liquors to retailers, and who in turn were compelled to sell

to the consuming public, all of which was under strict regulation.

(q) After the adoption of the Twenty-first Amendment to the Constitution of the United States, many small distilleries were organized and began to operate within the Commonwealth of Kentucky, but with little capital, and in order that such distilleries, included among which was Cummins Distilleries Corporation aforesaid, could finance themselves by the sale to the public of warehouse receipts issued by them for whiskey in storage, the Commonwealth of Kentucky adopted what is known as its Uniform Warehouse Receipts Act, being Chapter 358, Sections 358.010 to 358.590, in which it has declared warehouse receipts to be negotiable instruments and placed them on the footing of a foreign bill of exchange, and after prohibiting the sale of whiskey in any form except through licensees and under the control aforesaid, authorized the sale of warehouse receipts for alcoholic beverages, but prohibited the owner thereof from actually withdrawing or possessing the whiskey unless and except the owner possessed not only the warehouse receipts but the proper licenses issued under the Alcoholic Beverage Control Act aforesaid. (See Section 243.130, Alcoholic Beverage Control Act.)

In this Act it designated the warehouses in which alcoholic beverages could be sold, required the payment of all taxes due the Commonwealth of Kentucky before any distilled spirits could be withdrawn from the warehouses, which included both production, excises and ad valorem taxes.

(r) All of the whiskey aforesaid stored in the warehouses of Cummins Distilleries Corporation, receipts for which were distributed in kind to the stockholders aforesaid, was manufactured, stored and handled by said distilleries under and pursuant to the provisions of the aforesaid Acts.

(s) As result, warehouse receipts became negotiable instruments on a parity with stocks and bonds, and were offered and sold throughout the United States to the public freely and in large volume for investment purposes, so advertised, and many States of the Union denounced warehouse receipts as securities and assumed control over the sale thereof. Not only so, but the smaller distilleries, and in fact most all distilleries, used them as collateral for the borrowing of money for operating capital, and they were received by banks throughout the United States as collateral on a parity with promissory notes, stocks and bonds.

(t) By the foregoing Acts, it was the policy of Kentucky, in the enforcement of its control of the traffic in alcoholic beverages, to fix a minimum price at which it should be sold and the whole structure of the Kentucky control will fall and be of no avail and will accomplish none of the purposes sought to be accomplished by the legislative department of the Commonwealth of Kentucky unless and except that minimum price schedule is maintained.

(u) The General Maximum Price Regulation or March ceiling aforesaid, which became effective in May, 1942, under the terms of which it undertook to fix the maximum prices of all commodities within the United States, exempted securities from the provisions thereof. By the adoption of M. P. R. 193, which became effective August 5, 1942, the Price Administrator undertook to fix the maximum price of distilled spirits within the United States, but after fixing those maximum prices there was set forth in said M. P. R. 193 its Section 1420.2 in the following language:

> "Lower prices than those set forth in appendix (a) (Section 1420.13) may be charged, demanded, paid or offered."

(v) Neither of these regulations applied to the sale of warehouse receipts, but both regulations were in direct conflict with the Kentucky Fair Trade Act, and both of said regulations, as applied to the Commonwealth of Kentucky, are ineffective as to distilled spirits sold in Kentucky by reason of the fact that the Federal Government is without power to enforce a maximum price contrary to the provisions of the Kentucky price-fixing statute aforesaid.

(w) At the time the protestants, along with all other stockholders of the Cummins Distilleries Corporation, sold their warehouse receipts as aforesaid, the whiskey against which they were issued was in Kentucky and no part of it was moved out of Kentucky at any time while they were the owners of the warehouse receipts, and the sale of said warehouse receipts was consummated within the boundaries of the Commonwealth of Kentucky.

Neither of these protestants, at the time title to said warehouse receipts devolved upon them as a matter of law, and as they are advised, believe and now state, none of the stockholders of Cummins Distilleries Corporation, had the right, power or authority, under the law, to withdraw any whiskey covered by the warehouse receipts they owned and sold, or, in other words, their status as such owners of such warehouse receipts was the status created by the statutes of Kentucky aforesaid for the control of the liquor industry in Kentucky and to protect the revenues of the Commonwealth of Kentucky.

(x) Notwithstanding all of the foregoing facts, and in June, 1943, the Office of Price Administrator filed in the Federal District Court for the Western District of Kentucky Action No. 584, the style of which was Prentiss Brown, Price Administrator, Office of Price Administration, for and on behalf of the United States, v. Cummins

Distilleries Corporation and a large number but not all of the individual stockholders of Cummins Distilleries Corporation. In said suit, however, these protestants have been included as defendants. In this petition it is charged that either the Cummins Distilleries Corporation or these protestants, or both of them, sold approximately 51,000 "barrels of Bourbon whiskey" at prices above the ceiling fixed by M. P. R. 193, and judgment is sought in triple damages in the sum of $6,799,101.51 against each of these protestants as well as all stockholders sued, but not all of the stockholders of Cummins Distilleries Corporation were sued in said action.

(y) Of even date with the filing of said action, the Office of Price Administrator filed Action No. 585, in the Federal District Court aforesaid, the style of which is Prentiss Brown, Price Administrator, Office of Price Administration, for and on behalf of the United States, v. Cummins Distilleries Corporation and its directors, including one of these protestants, A. J. Cummins, in which it is charged that the General Maximum Price Regulation, adopted May 11, 1942, applied to the sale of packaged goods sold by Cummins Distilleries Corporation or the directors in the alternative, in violation of said regulation, and judgment is sought in said action for triple damages in the amount of $180,055.98.

(z) Each of said suits alleged the sale of alcoholic beverages as defined by Kentucky Statutes within Kentucky, and in each of said suits the present Administrator has been substituted as plaintiff, successor to Prentiss Brown.

VIII. Complainants filed in support of their protest, and the respondent now has Exhibits Nos. 1 to 7, both inclusive, consisting of the following in seriatim:

No. 1. Copy of the minutes and proceedings of stockholders of the Cummins Distilleries Corporation, including photostatic copy of Certificate of the State of Delaware showing that Delaware had recognized the proceedings as being in accordance with the laws of the State of Delaware.

No. 2. Printed copy of the Statutes of Kentucky referred to in the Statement of Facts.

No. 3. Copy of the petition in Action #584 now pending in Kentucky.

No. 4. Original affidavits of protestants.

No. 5. Facsimile of warehouse receipt issued by Cummins Distilleries Corporation.

No. 6. Affidavits of Earl Muir and C. G. Faine.

IX. The complainants, in their protest filed aforesaid, protested the regulations in their own behalf and in behalf of all other stockholders of Cummins Distilleries Corporation sued in Action #584 (Exhibit 3), because the facts alleged herein and in the protest are common to all stockholders, and the decision of the matters herein set forth could not be otherwise than common to all stockholders.

X. The nature of relief requested by the complainants is as follows:

(a) That this their complaint be filed;

(b) That this Court reverse the action of respondent in dismissing their protest on procedural grounds and return the protest to respondent with directions to refer the protest to a Board of Review for decision upon the merits as is

required by Section 203(c) of the Emergency Price Control Act, as amended;

(c) That the General Maximum Price Regulation issued April 28, 1942, effective May 11, 1942, and M. P. R. 193 issued August 2, 1942, effective August 5, 1942, and all schedules issued under either of said regulations be construed by this Court, and that it be held that neither of said regulations applied to or reached warehouse receipts, or the sale thereof, that were owned by complainants and described in this complaint.

(d) That it be held by this Court that warehouse receipts for whiskey stored in bonded warehouses, as hereinabove set forth, and particularly the warehouse receipts of complainants and stockholders of Cummins Distilleries Corporation, are expressly exempted from the provisions of the General Maximum Price Regulation aforesaid by its terms and that said warehouse receipts be held, under the facts, to be securities within the terms of said regulation.

(e) That General Maximum Price Regulation and M. P. R. 193, as in effect during January, 1943, and each of them, be held not to have any application to sales of warehouse receipts such as were sold by complainants in January, 1943.

(f) In the alternative, if the complainants are not sustained as to either one or all of the foregoing propositions, then and in that event they pray that it be held that General Maximum Price Regulation and M. P. R. 193, and each of them, be held to be unconstitutional and void when sought to be applied in Kentucky to the sale of distilled spirits in any form, and to be beyond the power of the Congress as well as the Administrator.

(g) For their costs herein expended, and for all other further and general relief to which they may be entitled in the premises.

Dated at Washington, D. C., this 22d day of June, 1945.

JOHN K. SKAGGS,
Kentucky Home Life Bldg.,
Louisville, Ky.
ALLEN P. DODD, SR.,
Marion E. Taylor Bldg.,
Louisville, Ky.
MAX O'REIL TRUITT,
1616 K Street, N. W.,
Washington, D. C.

[fol. 20] [Stamp:] United States Emergency Court of Appeals. Filed Jul. 5, 1945. Herman C. Beasley, Clerk

IN THE UNITED STATES EMERGENCY COURT OF APPEALS

No. 239

GEORGE C. COLLINS, JR., et al.

v.

CHESTER BOWLES, Price Administrator

MOTION TO DISMISS THE COMPLAINT

Now comes Chester Bowles, Price Administrator, Respondent, by his duly authorized attorney, and pursuant to Rule 13 of the Rules of this Court, moves the Court to dismiss the complaint filed herein on the ground that said complaint fails to state a claim upon which relief can be granted.

A memorandum in support of this motion is submitted herewith.

Respectfully submitted, Richard H. Field, General Counsel.

[fol. 21] [Stamp:] United States Emergency Court of Appeals. Filed Jul. 5, 1945. Herman C. Beasley, Clerk

IN THE UNITED STATES EMERGENCY COURT OF APPEALS

No. 239

GEORGE C. COLLINS, JR., et al.

v.

CHESTER BOWLES, Price Administrator

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS COMPLAINT

[fol. 22] On June 22, 1945, the above-entitled complaint was filed with this Court. The complaint alleges that on May 4, 1945, Complainants filed a protest with the Price Administrator objecting to certain provisions of the General Maximum Price Regulation and Maximum Price Regulation No. 193 (Comp. Par. III). It appears that the ap-

plicable provisions of the General Maximum Price Regulation were superseded on August 1, 1942, by Maximum Price Regulation No. 193 (7 F. R. 6006) and that these provisions in turn were superseded on February 3, 1943, by Amendment No. 4 to Maximum Price Regulation No. 193 (8 F. R. 1632) and on August 8, 1943 by Maximum Price Regulation No. 443 (8 F. R. 11161) (Comp. Par. VI(f)). It further appears that the protest was concerned with the effect upon past transactions of these superseded regulatory provisions (Comp. Pars. V, VII(y)).

The complaint is directed against an order issued by the Price Administrator on June 2, 1945, dismissing the protest (Comp. Pars. III, IV).[1] However, this order is clearly [fol. 23] consistent with decisions of this Court holding that protest proceedings may not be employed to secure determinations of the validity of regulatory provisions which have been superseded prior to the filing of the protest. *Chas. A. Krause Milling Co. v. Bowles*, (No. 203, April 12, 1945); *Eastern Wine Corporation v. Bowles*, (No. 213, May 17, 1945). *Cf. Thomas Paper Stock Co. v. Bowles*, 148 F. (2d) 831 (E. C. A. 1945) cert. granted June 4, 1945 (13 U. S. L. W. 3465).

The complaint should therefore be dismissed.

Respectfully submitted, Richard H. Field, General Counsel.

[fol. 24] EXHIBIT A

United States of America

Before the Office of Price Administration

Docket No. GF1-1142-P

In the Matter of GEORGE C. COLLINS, JR., et al., Protestants

ORDER DISMISSING PROTEST

On May 4, 1945, George C. Collins, Jr., and Christine Collins, of Glenview, Kentucky, and A. J. Cummins, Yancey Lee Cummins, and Edward J. Miller of Louisville,

---

[1] Certified copies of the order and accompanying opinion are annexed hereto as Exhibits A and B, respectively.

Kentucky, filed a protest against provisions of the General Maximum Price Regulation and of Maximum Price Regulation No. 193. The protest does not comply with Section 203(a) of the Emergency Price Control Act for the reasons set forth in the opinion accompanying this order and must be dismissed.

Therefore, in accordance with the Emergency Price Control Act of 1942, as amended, and Revised Procedural Regulation No. 1, it is ordered that said protest, Docket No. GF1-1142-P be, and it hereby is, dismissed.

Issued and effective this 2 day of June, 1945.

(Signed) Chester Bowles, Administrator.

[fol. 25] UNITED STATES OF AMERICA

Before the Office of Price Administration

Docket No. GF1-1142-P

In the Matter of GEORGE C. COLLINS, JR., et al., Protestants

OPINION ACCOMPANYING ORDER DISMISSING PROTEST

On May 4, 1945, George C. Collins, Jr. and Christine Collins, of Glenview, Kentucky, and A. J. Cummins, Yancey Lee Cummins, and Edward J. Miller of Louisville, Kentucky filed a protest against provisions of the General Maximum Price Regulation and of Maximum Price Regulation No. 193.

All of the Protestants were stockholders of the Cummins Distilleries Corporation. In addition, Protestant A. J. Cummins was a director of the corporation. During the period from August 27, 1933 to December 31, 1942 the Cummins Distilleries Corporation was engaged in the business of distilling whiskey and gin.

The corporation sold whiskey in bulk and whiskey and gin in cases. It also stored whiskey in bonded warehouses, on which warehouse receipts were issued. On December 31, 1942 the Cummins Distilleries Corporation was dissolved. In the course of liquidation these warehouse receipts were distributed to the Corporation's stockholders including Protestants. Protestants allege that these warehouse receipts were sold on behalf of the stockholders

during January 1943, the last sale being made about January 9, 1943.

On May 27, 1943 two treble damage actions were commenced in the United States District Court for the Western District of Kentucky against Protestants and others. One action was directed against all of the Protestants and others as stockholders of the Cummins Distilleries Cor- [fol. 26] poration and was based upon the sale of the previously described warehouse receipts for bulk whiskey subsequent to the dissolution of the Corporation at prices in excess of the maximum price for whiskey established by Maximum Price Regulation No. 193. The other action was directed against Protestant A. J. Cummins and others as officers and directors of the Corporation and was based upon sales of bulk whiskey and whiskey and gin in cases made prior to the dissolution of the Corporation. It was alleged in this proceeding, that certain sales made prior to August 5, 1942, were in violation of provisions of the General Maximum Price Regulation and that sales made after August 5, 1942 violated provisions of Maximum Price Regulation No. 193. These actions are pending at the present time.

Prior to August 5, 1942, sales of intoxicating liquors including whiskey and gin, were subject to the provisions of the General Maximum Price Regulation. Maximum Price Regulation No. 193, which was effective on August 5, 1942, superseded the General Maximum Price Regulation with respect to sales of domestic distilled spirits, including whiskey and gin sold in cases and bulk whiskey. With certain exceptions, Maximum Price Regulation No. 193 continued the pricing method of a March 1942 freeze applied by the General Maximum Price Regulation. Maximum Price Regulation No. 445, effective on August 14, 1943, established specific dollars-and-cents maximum prices for sales of domestic distilled spirits and wines, including whiskey and gin, superseding Maximum Price Regulation No. 193.

It appears that Protestants' sole interest in attacking provisions of the General Maximum Price Regulation and of Maximum Price Regulation No. 193 arises out of enforcement proceedings pending against them. They have set forth no objections to Maximum Price Regulation No. 445, the Regulation applicable to sales of whiskey and gin at the time the protest was filed.

[fol. 27] The price Administrator does not regard this attempt to question the validity of a maximum price regulation rescinded prior to the filing of the protest as a proper use of the protest procedure. See *Thomas Paper Stock Company v. Bowles*, No. 159 (E. C. A., March 27, 1945); *Chas. A. Krause Milling Company v. Bowles*, (E. C. A., April 12, 1945). It does not appear that at the time the protest was filed Maximum Price Regulation No. 193 or the General Maximum Price Regulation against which the protest is directed either required or prohibited action by the Protestants. Hence, the protest failed to comply with the limitation in Section 203(a) of the Emergency Price Control Act that a person may file a protest against a provision of a regulation only if he is "subject to" that provision. See *The Buka Coal Company v. Brown*, 133 F. (2d) 249 (E. C. A., 1943).

Moreover, the character of the proceeding which Protestants seek to institute is inconsistent with the general purpose and framework of the protest and review provisions of the Act. The fundamental purpose underlying the inclusion in the Emergency Price Control Act of these provisions was to provide for reexamination and proper modification of maximum price regulations in the light of the facts presented in the protest proceeding. Since Maximum Price Regulation No. 193 and the General Maximum Price Regulation have been superseded in their application to sales of whiskey and gin, this objective would not be served by consideration of this protest on the merits.

It appears that Protestants' sole interest in securing a determination that the General Maximum Price Regulation and Maximum Price Regulation No. 193 are invalid as applied to their sales is to interpose such a determination as a defense in enforcement proceedings pending against them. The appropriate procedures prescribed by Congress for such cases in which the sole issue is the liability of a defendant in an enforcement action are those [fol. 28] set forth in Section 204(e) of the Act, subject to the conditions and requirements there set forth.

To permit recourse to the protest procedure in cases such as this instead of the procedures provided in Section 204(e) would permit circumvention of the limitations expressly set forth in the Act upon retroactive determinations of the validity of maximum price regulations. Thus

Section 204(e) provides that a defendant in an enforcement action may secure leave to file a complaint with the Emergency Court of Appeals only with respect to objections found by the district court to be made in good faith and for which reasonable and substantial excuse exists for the defendant's failure to present such objections in a protest. Congress thereby clearly evidenced its intent not to open wide the door for attacks upon the past validity of regulations by those charged with their violation, but rather to preserve that privilege to those who can make the showing required under Section 204(e)(1). A substantial inroad would be made on this limitation if in cases such as this the protest proceedings could be used in lieu of the procedures prescribed by Section 204(e).

In addition, serious problems of administration are presented if the protest procedure can be used where only liability in an enforcement action is involved. Where, as in this case, the protest was filed after institution of the enforcement proceeding, Section 205(e)(2) of the Act provides that the pendency of the protest and review proceeding may not be grounds for staying the enforcement action.[1] As a result of this prohibition against granting stays in such cases the enforcement proceedings and exe- [fol. 29] cution of judgment could well be completed prior to the termination of the protest and review proceedings. Any determination that the regulation was invalid would therefore be rendered wholly futile.

It does not appear appropriate to the Price Administrator to consider Protestants' objections to the General Maximum Price Regulation and Maximum Price Regulation No. 193 as directed to Maximum Price Regulation No. 445. Altering the provisions of Maximum Price Regulation No. 445 would not provide the relief desired by Protestants; since any change in this Regulation would have no effect upon the enforcement proceeding pending against them. As already indicated, Protestants have not sought a determination with respect to the validity of Maximum Price Regulation No. 445, and Protestants' allegations as

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[1] The Price Administrator is advised that in this case Protestants requested a stay of the enforcement proceedings during pendency of the protest proceedings but that such request was denied by the District Court.

the manner in which they were subject to Maximum Price Regulation No. 193 and the General Maximum Price Regulation indicate that they had no further interest in sales of whiskey or gin after January 9, 1943, a date prior to the effective date of Maximum Price Regulation No. 345.

For the foregoing reasons, the protest should be dismissed.

Issued this 2 day of June, 1945.

(S.) Chester Bowles, Administrator.

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fol. 30] [Stamp:] United States Emergency Court of Appeals. Filed Jul. 12, 1945. Herman C. Beasley, Clerk

In the United States Emergency Court of Appeals

No. 239

George C. Collins, Jr., et al.,

v.

Chester Bowles, Price Administrator

Objections to Granting of Motion to Dismiss

Now come Complainants, by their duly authorized attorneys, and pursuant to Rule 14 (b) of the Rules of this Court, object to the granting of the motion to dismiss the complaint for the following reasons:

1. The complaint states a claim upon which relief can and must be granted.

2. The protest which was dismissed by the Price Administrator was duly filed with him, as permitted by Section 203 (a) of the Emergency Price Control Act, as amended, and was erroneously dismissed by the Price Administrator.

3. In June 1943, the Price Administrator instituted a civil proceeding (now pending) in the United States District Court in Louisville, Kentucky to recover treble dam-
fol. 31] ages amounting to $6,799,101.51 against Complainants, alleging sales in excess of maximum ceiling prices

on bulk whiskey prescribed by the General Maximum Price Regulation and Maximum Price Regulation No. 193; if there is any liability for such alleged sales in violation of ceiling prices, it must be because Complainants were and are subject (for enforcement purposes) to the provisions of the two regulations and Section 203 (a) of the Emergency Price Control Act, as amended, authorizes the filing of a protest "at any time" after the issuance of a regulation by any person "subject" to any provision of such regulation.

4. It is absurd for the Price Administrator to contend that the Complainants are not "subject" to the provisions of General Maximum Price Regulation and Maximum Price Regulation No. 193 at a time when the Price Administrator is attempting to collect treble damages amounting to $6,799,101.51 against Complainants in a civil suit for alleged violations of ceiling prices prescribed by the regulations in question.

5. It is immaterial that General Maximum Price Regulation, as related to whiskey prices, and Maximum Price Regulation No. 193 were superseded by another regulation after the civil suit was filed in Kentucky by the Price Administrator against Complainants to collect treble damages for alleged violations of the two first mentioned regulations, because Complainants had the unqualified right under Section 203 (a) of the Emergency Price Control Act, as amended, to protest the regulations when their protest was filed with the Price Administrator on May 4, 1945.

[fol. 32] 6. In dismissing the protest, the Price Administrator flagrantly ignored the express provisions of Section 203 (c) of the Emergency Price Control Act, as amended, by failing to refer the protest, as requested by Complainants in their protest, to a board of review before denying same, in whole or in part, or in dismissing the protest.

7. On June 4, 1945, the Supreme Court of the United States granted a writ of certiorari in the case of *Thomas Paper Stock Company* v. *Bowles*, Docket 1206, to review the ruling of this Court that a protest may not be filed under Section 203 (a) covering past transactions where the regulation has been superseded before the protest was filed but enforcement proceedings were pending at the time

the protest was filed, and a decision by the Supreme Court will be controlling in the instant case.

8. The decisions of this Court in *Charles A. Krause Milling Co.* v. *Bowles*, 148 Fed. 2d 844 and *Eastern Wine Corporation* v. *Bowles* No. 213 decided May 17, 1945, are no longer authorities which support the motion to dismiss since a writ of certiorari was granted by the Supreme Court of the United States on June 4, 1945 in *Thomas Paper Stock Company* v. *Bowles*, Docket 1206.

9. Under the principle announced in *United States* v. *Hark*, 320 U. S. 531, a protest proceeding may be employed under Section 203 (a) of the Emergency Price Control Act, as amended, to secure determination as to the validity and [fol. 33] application of regulatory provisions which have been superseded prior to the filing of the protest, where enforcement proceedings are pending to collect treble damages under the superseded regulations when the protest is filed.

Respectfully submitted, John K. Skaggs, Kentucky Home Life Building, Louisville, Kentucky; Allen P. Dodd, Sr., Marion E. Taylor Building, Louisville, Kentucky; Max O'Rell Truitt, 1616 K Street Northwest, Washington, D. C., Attorneys for Complainants.

July 12, 1945.

[fol. 34] [Stamp:] United States Emergency Court of Appeals. Filed Jul. 13, 1945. Herman C. Beasley, Clerk

IN THE UNITED STATES EMERGENCY COURT OF APPEALS

No. 239

GEORGE C. COLLINS, et al.

v.

CHESTER BOWLES, Price Administrator

MEMORANDUM IN SUPPORT OF OBJECTIONS TO GRANTING OF MOTION TO DISMISS

On May 4, 1945, Complainants filed a protest with the Price Administrator objecting to the provisions of General

Maximum Price Regulation and Maximum Price Regulation No. 193. The protest was filed, as authorized by Section 203 (a) of the Emergency Price Control Act, which section provides that "*at any time* after the issuance of any regulation or order under Section 2, or in the case of a price schedule, *at any time* after the effective date thereof * * * any person *subject to* any provision of such regulation, order, [fol. 35] or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision * * *" (emphasis supplied).

At the time the protest was filed there was pending against protestants and others in the United States District Court at Louisville, Kentucky a civil proceeding (instituted in May 1943) to recover treble damages amounting to $6,799,101.51 for alleged sales in 1942 and 1943 of whiskey in excess of the maximum ceiling price prescribed by General Maximum Price Regulation and Maximum Price Regulation No. 193. Obviously, if there is any liability for such alleged sales in violation of ceiling price, it must be because Complainants *were and are* (for enforcement purposes) *subject to* the two regulations aforementioned. Hence, the protest was properly filed under Section 203 (a) which authorizes the filing of a protest "*at any time*" after the issuance of a regulation by any person *subject to* any provision of such regulation.

On June 2, 1945, the Price Administrator erroneously dismissed the protest for the stated reason that it did not comply with Section 203 (a) of the Emergency Price Control Act. In dismissing the protest, the Price Administrator ignored the express provisions of Section 203 (e) of [fol. 36] the Act by failing to refer the protest as requested by protestants in their protest, to a Board of Review before denying same, in whole or in part, or in dismissing the protest. Such action by the Price Administrator also ignored Sections 35 (b), 43 and 59 of Procedural Regulation No. 1 issued by him.

On June 22, 1945 Complainants duly filed their complaint with this Court, as authorized by Section 204 (a) of the Act, to review the erroneous action of the Price Administrator in dismissing their protest on procedural grounds by his order of June 2, 1945.

The Price Administrator has filed a motion to dismiss the complaint and in so doing relies upon prior decisions of this

Court in *Krause Milling Company* v. *Bowles*, 148 Fed. 2d 845 and *Eastern Wine Corporation* v. *Bowles*, No. 213, May 17, 1945. The Krause case was decided by this Court shortly after it decided *Thomas Paper Stock Company* v. *Bowles*, 148 Fed. 2d 831 and merely follows the decision in the Thomas case. The latter case is now before the Supreme Court of the United States, a writ of certiorari having been granted on June 4, 1945 (two days after the Price Administrator dismissed the protest in the pending case) under Docket No. 1206. A decision by the Supreme Court on the issue involved in the Thomas Paper Stock Company [fol. 37] case will be controlling upon the issue raised by the motion to dismiss now pending before this Court in the instant case. Therefore, it seems only fair that this Court should not sustain the motion to dismiss pending decision by the Supreme Court in the Thomas case since there is obviously grave doubt that the prior rulings of this Court have been correct.

Section 205 (e) of the Emergency Price Control Act authorized the Price Administrator to institute a civil action to collect treble damages against a person selling a commodity in excess of ceiling prices established by regulations of the Administrator and such a suit must be brought within one year from the date of the occurrence of the violation. In the instant matter, suit was instituted in the United States District Court at Louisville, Kentucky by the Administrator in May 1943 to recover $6,799,101.51 from Complainants and others for alleged sales in excess of ceiling prices on whiskey established by General Maximum Price Regulation and Maximum Price Regulation No. 193. Unless Complainants are now *subject to* the provisions of General Maximum Price Regulation and Maximum Price Regulation No. 193 within the meaning of Section 203 (a) of the Emergency Price Control Act granting the right to protest, it must follow that they are not now subject to the pro- [fol. 38] visions of Section 205 (e) imposing liability for treble damages and that the treble damage suit pending against them in Louisville, Kentucky must be dismissed because Complainants are no longer subject to the regulations relied upon by the Administrator in his suit, the regulations having been superseded by other regulations and no regulation now being applicable to alleged sales made by Complainants in 1942 and January 1943. Obviously, there

is no basis for a different interpretation of Section 203 (a) than of Section 205 (e). In other words, Complainants cannot be considered on one hand as *subject to* General Maximum Price Regulation and Maximum Price Regulation No. 193 for purpose of liability for treble damages and, on the other hand, be treated as not subject to the same regulations for purpose of filing a protest under Section 203 (a).

The unqualified rights of Complainants to file a protest with the Price Administrator under Section 203 (a) and to appeal from his decision thereon to this Court by filing a complaint under Section 204 (a) are in no way abridged by the provisions of Section 204 (e). The latter Section merely gives Complainants a possible, additional protection by permitting the filing of a complaint with this Court upon leave obtained from the District Court within five days after judgment in a civil suit. This cumulative remedy is provisional upon the action of the District Court and it [fol. 39] does not give a party an unqualified right to file a complaint with this Court. In its prior decisions relied upon by the Price Administrator in his memorandum, this Court has been guilty of judicial legislation in limiting the unconditional rights of Complainants to file protest under Section 203 (a). It is believed that the Supreme Court of the United States will correct the errors of this Court in its decision upon review of the Thomas Paper Stock Company case, Docket No. 1206. As the dissenting opinion of Justice Laws so forcefuly points out in the Thomas case, the prior opinions of this Court limiting the right of protest under Section 203 (a) are erroneous and in direct violation of the clear wording of the statute.

Under the principle announced in *United States* v. *Hark*, 320 U. S., 531, 536, a protest may be employed under Section 203 (a) of the Emergency Price Control Act to secure a determination as to the validity and application of regulatory provisions, which have been superseded prior to the filing of the protest, where an enforcement action for treble damages is pending, based upon the superseded regulations, at the time the protest is filed. Revocation of the regulations in the instant case did not repeal Sections 203 (a) and 204 (a) of the Act. The statute—not the regulations—creates the right to protest and to appeal by complaint to this [fol. 40] Court from an adverse ruling of the Price Administrator on a protest.

No question of staying the enforcement action pending in Louisville, Kentucky is involved in the instant complaint. The interpretation of Section 205 (c) (2) of the Act is not in issue. The Price Administrator in his opinion dismissing the protest states that:

> "• • • the enforcement proceedings and execution of judgment could well be completed prior to the termination of the protest and review proceedings. Any determination that the regulation was invalid would therefore be rendered wholly futile. • • •"

This reasoning is absurd on its face, and nothing more than a weak excuse advanced by the Price Administrator for neglecting his duty to promptly decide the protest on its merits. Less speculation by the Price Administrator and more attention to the performance of his duty to decide protests promptly would be helpful. As a matter of fact, trial of the enforcement proceedings has already been postponed until October. Complainants are entitled to have their protest decided promptly. If their contentions are sound, a decision of the Price Administrator, or of this Court, holding the provisions of General Maximum Price Regulation and Maximum Price Regulation No. 193 inapplicable to, and that the regulations prescribed no ceiling prices on, sales of warehouse receipts made by Complain- [fol. 41] ants will enable the latter to introduce the ruling in evidence as a complete defense at the trial in the enforcement suit.

Summary of Argument

Under Section 204 (d) of the Emergency Price Control Act *only* the Emergency Court of Appeals may decide the legality of price regulations issued by the Price Administrator. If a party may not file a protest to question the legality of price regulations which have been superseded but which superseded regulations are the basis of a claim for treble damages, as in the pending matter, then, should the District Court after judgment and upon application under Section 204 (e) (1) *not* permit the filing of a complaint with the Emergency Court the result will be that the party is deprived of *all right* to have the validity of the regulations contested in the only Court having jurisdiction to decide the question. Obviously, such a result was not intended by the Congress in enacting Section 204 (e) (1)

which merely gives to a party cumulative, possible, additional means of protection and does not expressly, or by [fol. 42] implication, repeal the absolute right to protest granted by Section 203 (a).

This Court should not by judicial legislation take away from a party his unqualified statutory right to protest the validity of regulations under Section 203 (a) merely because a possible—not an absolute—right is given to the party to file a complaint before the Emergency Court after judgment but which possible right is subject to the absolute discretion of the District Court. Otherwise, Section 204 (e) (1) instead of providing an additional cumulative means of protection may have the effect of wholly depriving a party of any right to have the Emergency Court pass upon the validity of regulations.

It need not of course be argued that no claims by the Price Administrator of mere administrative inconvenience can possibly justify the deprivation by this Court, through a strained construction of Section 204 (e) (1), of the absolute right to protest the validity of regulations under Section 203 (a).

Conclusion

The motion to dismiss the complaint should be overruled [fol. 43] and the complaint should be decided upon its merits. In the alternative, the matter should be returned to the Price Administrator with instructions to refer the protest to a Board of Review under the mandatory requirement of Section 203 (c) of the Emergency Price Control Act.

Respectfully submitted, John K. Skaggs, Kentucky Home Life Building, Louisville, Kentucky; Allen P. Dodd, Sr., Marion E. Taylor Building, Louisville, Kentucky; Max O'Rell Truitt, 1616-K Street, Northwest, Washington, D. C., Attorneys for Complainants.

[fol. 44] [Stamp:] United States Emergency Court of Appeals. Filed Jul. 17, 1945. Herman C. Beasley, Clerk

IN THE UNITED STATES EMERGENCY COURT OF APPEALS

No. 239

GEORGE C. COLLINS, ET AL.,

v.

CHESTER BOWLES, Price Administrator

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF OBJECTIONS TO GRANTING OF MOTION TO DISMISS

Maximum Price Regulation 445 became effective August 14, 1943, or over seven months after Complainants sold warehouse receipts, covering bulk whiskey, in January 1943. Obviously, the prices prescribed by MPR 445 could not apply to actual sales and deliveries made seven months before its issuance.

Section 2.1 (b) of MPR 445 provides that MPR 445 supersedes General Maximum Price Regulation and MPR 193 [fol. 45] "except as otherwise provided in this regulation". The exception is contained in Section 7.4a of MPR 445 which provides:

> "Maximum prices for sellers for whom no specific provision is made. The maximum price for any seller of distilled spirits or wine for whom no maximum price is provided in this regulation and who is otherwise unable to determine a maximum price hereunder, shall be his maximum price established by whichever of the following regulations of the Office of Price Administration is applicable: Maximum Price Regulation 193; General Maximum Price Regulation; National Regional or District Restaurant Maximum Price Regulations."

In other words, Section 7.4a of MPR 445 expressly continued in effect General Maximum Price Regulation and MPR 193 to provide maximum prices for any seller for whom no maximum price was provided in MPR 445. Clearly, General Maximum Price Regulation and MPR 193 were continued in effect to include such sellers as Com-

plainants in the instant matter because their sales of warehouse receipts were made seven months before MPR 445 became effective. It seems odd that counsel for the Price Administrator should contend that the earlier regulations aforementioned have been superseded by MPR 445 in so far as their effect upon the instant matter is concerned.

[fol. 46] Since General Maximum Price Regulation and MPR 193 were expressly continued in effect by Section 7.4a of MPR 445, it is obvious that Complainants were, "subject to" the former two regulations when their protest was filed with the Price Administrator on May 4, 1945. Hence, the principle (believed to be erroneous) announced by this Court in *Thomas Paper Stock* v. *Bowles* 148 Fed. 2d 831; *Krause Milling Co.* v. *Bowles* 148 Fed. 2d 845 and *Eastern Wine Corporation* v. *Bowles*, No. 213 May 17, 1945 can have no application to the facts of the pending case. Being "subject to" General Maximum Price Regulation and MPR 193 on May 4, 1945 in relation to sales made in January 1943, it is clear that Complainants had the unqualified right under Section 203 (a) of the Act to protest these regulations before the Price Administrator and to appeal from his dismissal of their protest by filing a complaint with this Court under Section 204 (a).

[fol. 47] Conclusion

The motion to dismiss the complaint should be overruled and the complaint should be decided upon its merits.

Respectfully submitted, John K. Skaggs, Kentucky Home Life Building, Louisville, Kentucky; Allen P. Dodd, Sr., Marion E. Taylor Building, Louisville, Kentucky; Max O'Rell Truitt, 1616 K Street, Northwest, Washington, D. C., Attorneys for Complainants.

[fol. 48] [Stamp:] United States Emergency Court of Appeals. Filed Aug. 9, 1945. Herman C. Beasley, Clerk

UNITED STATES EMERGENCY COURT OF APPEALS

No. 239

GEORGE C. COLLINS, JR., et al.

v.

CHESTER BOWLES, Price Administrator

Present: Maris, C. J., and Magruder, McAllister, Lindley and Laws, JJ.

JUDGMENT

Upon consideration of Respondent's motion to dismiss the complaint and of Complainants' objections thereto and memorandum and supplemental memorandum in support of objections, and the Court being of opinion that it is without jurisdiction to entertain the complaint,

It is ordered and adjudged that the complaint herein be, and it hereby is, dismissed.

It is further ordered that the clerk of this Court transmit forthwith a certified copy of this judgment to the Price Administrator.

Dated August 9, 1945.

By the Court.

Teste: Herman C. Beasley, Clerk.

[fol. 49] UNITED STATES EMERGENCY COURT OF APPEALS

I, Herman C. Beasley, Clerk of the United States Emergency Court of Appeals, hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 48, both inclusive, constitute a true copy of

(1) Complaint
(2) Respondent's motion to dismiss Complaint and memorandum in support thereof
(3) Proceedings in the United States Emergency Court of Appeals

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in the case of: No. 239, George C. Collins, Jr., et al., v. Chester Bowles, Price Administrator, as the same remain upon the files and records of said United States Emergency Court of Appeals.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said United States Emergency Court of Appeals, at the City of Washington, this 20th day of August, A. D. 1945.

Herman C. Beasley, Clerk, United States Emergency Court of Appeals, by J. Fredrick Mattingley, Chief Deputy Clerk. (Seal.)

[fol. 50] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 5, 1945

The petition herein for a writ of certiorari to the United States Emergency Court of Appeals is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.